

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOSEPH D. MITCHELL, JR.,)	
)	
Petitioner)	
)	
v.)	Civil No. 99-0046-B
)	
STATE OF MAINE,)	
)	
Respondent)	

RECOMMENDED DECISION

Petitioner has filed a pro se Petition for Writ of Habeas Corpus asserting three grounds for relief. Respondent has answered the Petition, addressing both the question whether Petitioner has exhausted his state remedies pursuant to 28 U.S.C. section 2254(b), and the substantive merits of Petitioner's claims.

It has long been the rule that petitions containing claims regarding which the petitioner has not exhausted all of the remedies available to him in the state courts are dismissed, despite the presence of exhausted claims. *Eg., Tart v. Massachusetts*, 949 F.2d 490, 494 (1st Cir. 1991) (citing *Rose v. Lundy*, 455 U.S. 509, 513-21 (1982)) (other citations omitted). With the enactment of the Antiterrorism and Effective Death Penalty Act ["AEDPA"] in April, 1996, certain exceptions were created to this rule. Unexhausted petitions may now be denied on the merits if they fail to raise a federal claim. 28 U.S.C. § 2254(b)(2); *Liegakos v. Cook*, 106 F.3d 1381, 1388 (7th

Cir. 1997). These petitions may also be addressed on the merits if presenting the claims to the state court would be futile, either because a state procedural rule would bar the attempt, or because the state court has already pronounced a rule contrary to the petitioner's argument. 28 U.S.C. § 2254(b)(1)(B); *Lindh v. Murphy*, 521 U.S. 320, 340 n.2 (1997) (state procedural default); *Lynce v. Mathis*, 519 U.S. 433, 436 n.4 (1997) (contrary state decision); *see also, Adelson v. DiPaola*, 131 F.3d 259 (1st Cir. 1997) (exceptions to the exhaustion requirement include "where exhaustion plainly would be futile or where the state has waived the requirement").

In this case, Petitioner has set forth three claims for relief, one of which was raised in a petition for state post-conviction review that was dismissed without prejudice. The claim raises the question whether Petitioner received effective assistance of counsel in the underlying criminal matter, which issue could not be clearly foreclosed by state court decisions addressing other factual scenarios. Nor is the claim procedurally barred in the state court: Petitioner's limitations period will not expire until June 1, 1999, or one year after the denial of his direct appeal. 15 M.R.S.A. § 2128(5)(A). There is no question, of course, that the right to the effective assistance of counsel arises under the federal constitution. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

It is true that Petitioner set forth the ineffective assistance of counsel as the reason why he procedurally defaulted one of the two other claims raised in the Petition, rather than as a separate, independent claim. It has long been the law, however, that ineffective assistance may be raised as cause for a procedural default only if it has been independently exhausted before the state courts. *Murray v. Carrier*, 477 U.S. 478, 489 (1986). Because Petitioner's claim for ineffective assistance of counsel has not been exhausted and does not fall into one of the exceptions discussed above, the Petition is properly dismissed in its entirety. *Adelson*, 131 F.3d at 261.

Conclusion

For the foregoing reasons, I hereby recommend the Petition for Writ of Habeas Corpus be DISMISSED for Petitioner's failure to exhaust his state remedies pursuant to 28 U.S.C. § 2254(b).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated on April 26, 1999.